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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

Nos. 330 and 331.

PETER L. McDONNELL, *Petitioner*,

vs.

THE UNITED STATES.

DOMINIC A. TRUDA, *Petitioner*,

vs.

THE UNITED STATES.

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF.

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE.

The undersigned, attorneys for taxpayers having cases pending in the Court of Claims and in the Bureau of Internal Revenue, involving the question presented in the above-named cases, respectfully move this Court for leave to file the subjoined brief as friends of the Court.

FRED A. WOODIS.

FRANCIS R. LASH,
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BRIEF AMICI CURIAE.

ARGUMENT.

The question presented is limited by the order allowing certiorari to the following:

> Does Section 278 (e) of the Revenue Act of 1924 render invalid waivers executed after the enactment of the Revenue Act of 1924 with respect to taxes the assessment and collection of which had become barred prior to the enactment of the Act.

Stated differently, the question is:

> Did Section 278 of the Revenue Act of 1924 authorize the extension by waiver, after its enactment, of the period provided in Section 277 of the same Act, with respect to taxes the assessment and collection of which had become barred prior to the effective date of the Act.

Before addressing ourselves to the precise question at issue, we wish to touch briefly upon certain general rules of statutory construction which must guide our approach to the ultimate question, and which are, in the last analysis, determinative of the question involved.

The statute involved is one levying taxes and, therefore, must be construed strictly against the Government and liberally in favor of the taxpayer (*Gould v. Gould*, 245 U. S. 151, 153; *United States v. Merriam*, 263 U. S. 179, 188, 189). It was made possible of enactment only by a Constitutional Amendment, being repugnant to the Constitution as originally adopted, and likewise being in derogation of the common law; for these reasons, we submit, the statute must be construed strictly against the sovereign.

Beginning with the Acts enacted prior to the 1918 Act, Congress provided a statutory period of three years within which income taxes must be assessed, and all assessments

made under such Acts must have been made within such three year period in order to be legally collectible (*Aiken v. Burnet*, 282 U. S. 277, 280, n. 2; *Stange v. United States*, 282 U. S. 270, 274, n. 2; *Brown & Sons Co. v. Burnet*, 282 U. S. 283, 286, n. 2). However, where such assessments were timely made they could be collected at any time, until the enactment of the 1921 Act which provided in section 250 (d) that such taxes must be both assessed and collected within five years after the taxpayer's return was filed, "unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment and collection."

That enactment was the first wherein Congress provided a statutory method (by waivers) of enlarging or extending the statutory period otherwise applicable to the assessment and collection of income taxes. Written consents (waivers) to extend the statutory period of limitation, executed prior to the statutory grant of authority so to do, as pointed out by the court below (McDonnell R. 13, 14), have been held by this Court to be effective **in the absence of a statute** providing for a method extending the statutory period (*Aiken v. Burnet, supra*); such holding, by this Court, having been predicated upon the authority of the Commissioner to promulgate and enforce administrative regulations on the subject. However, that decision **did not** announce that the Commissioner might promulgate or enforce regulations contrary to existing statutes on the subject, nor is it authority for the contention, made by respondents in these cases, "that no express statutory provision is necessary to make valid a waiver by a taxpayer of the period of limitation on the assessment or collection of a tax."

Thereafter Congress enacted the Revenue Act of 1924 providing therein (Section 277) that taxes imposed by the Revenue Act of 1917 (such as those here involved) must be assessed and collected within five years after the

taxpayer's return was filed **except as provided in Section 278** of the same Act.

The pertinent portions of section 278 are:

> (c) Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon.
>
> * * * * * * * * *
>
> (e) This section shall not (1) authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court if at the time of the enactment of this Act such assessment, distraint, or proceeding was barred by the period of limitation then in existence, * * *.

Congress continued this policy of providing a **statutory** method of extending the period of limitation, in the later Acts of 1926, 1928, and 1932.

The broad question presented by these cases to the court below (the gravamen of petitioners' actions brought below), was whether the statutory period of limitation for assessment and collection of the taxes had expired at the time such assessments and collections were made.

When these taxes were assessed and collected the Revenue Act of 1926 was in effect; that Act, as did the 1921 and 1924 Acts, provided a statutory period of five years within which taxes for the year 1917 must be assessed and collected (See Sec. 277), subject to the exceptions contained in Sec. 278 of the same Act.

Of those exceptions, those pertinent here are:

> (c) Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon.
>
> * * * * * * * * *

> (e) This section shall not bar a distraint or proceeding in court begun before the enactment of the Revenue Act of 1924; nor shall it authorize the assessment of a tax or the collection thereof by distraint or by proceeding in court (1) if at the time of the enactment of this Act such assessment, distraint or proceeding, was barred by the statutory period of limitation properly applicable thereto, unless prior to the enactment of this Act the Commissioner and the taxpayer agreed in writing thereto, * * *.

Subdivision (c) of Section 278 of the 1926 Act, quoted above, was wholly prospective, providing for the extension of the five year period by the Commissioner and the taxpayer **after its passage**; but it was not a ratification of the acts of the parties consummated prior to its enactment.

Subdivision (e) prevents the application of the section to any case wherein assessment and collection were barred at the time of its enactment "unless prior to the enactment of this Act the Commissioner and the taxpayer agreed in writing thereto." The agreements referred to by Congress in this qualifying clause, were **valid and effective** agreements; Congress did not mean that if ineffective or invalid agreements (waivers) had been executed prior to that Act, that the clause in question should validate them.

Respondent contends, however, that even if the right to assess and collect was barred under the statutes in effect prior to the enactment of the 1926 Act, it is plain that Congress had the power to and did revive that right by section 278 of the 1926 Act (respondent's brief pp. 15, 16). That such view of respondent is erroneous, seems clear. For this Court in the case of *United States v. Magnolia Petroleum Co.*, 276 U. S. 160, declared at page 162:

> "Statutes are not to be given retroactive effect or construed to change the status of claims fixed in accordance with earlier provisions unless the legislative purpose so to do plainly appears."

No plain purpose to change the status of the Government's claims against petitioners as they existed just prior to February 26, 1926, can be spelled out of the words in Section 278.

To determine whether the waivers in question were valid when given, it is necessary to consider the law in effect **at the time they were filed.**

The legislative history of Section 506 of the Revenue Act of 1928 in its entirety, a part of which has been relied upon by respondent to show that Congress believed all waivers filed prior to the Revenue Act of 1926 were valid, confirms the view that the 1924 Act alone determines the validity of the waivers in question. In support of respondent's view to the contrary, however, there was quoted from the House Report No. 2, 70th Congress, 1st Session, p. 29, (respondent's brief p. 14) as follows: "Waivers filed prior to the 1926 Act are undoubtedly valid and have been so held by the Board of Tax Appeals. * * *" That quoted statement was made in the House Report as part explanation of the House draft of Section 506 of the 1928 Bill whereby it was provided that all waivers were valid whether given before or after the statute of limitations had run. The Finance Committee of the Senate, amended the House draft of Section 506, however, to provide that of future waivers, only those given **before** the expiration of the statute of limitation would be valid (except those filed between the dates of the enactment of the 1928 Act and January 1, 1929, with which we are not here concerned); but, with reference to waivers filed before the enactment of the 1928 Act, the Senate amendment definitely provided, as stated in Senate Report No. 960, 70th Congress, 1st sess. (p. 36), that:

> "* * * As to waivers filed before the enactment of this act but after the expiration of the period of limitation, the committee feels that the matter should *be left where it now stands*, to be determined *under the law in existence at the time the waiver is filed*, and by

an amendment to the House bill carries that policy into effect." (Italics ours.)

The conferees of the House accepted the Senate revision of Section 506, and Conference Report No. 1882, 70th Congress, 1st sess. contained the following statement with reference thereto (p. 21):

> "These amendments which relate to the validity of waivers executed after the expiration of the period of limitation intended to be waived, are similar to amendments Nos. 131, 132, 133, and 134 above. The House bill made such waivers effective even though executed after the expiration of such period. The Senate amendment confines the provisions to waivers executed before the expiration of the period; and the House recedes."

Section 506 as enacted, therefore, provides:

> (c) The amendments made by this section to the Revenue Act of 1926 shall not be construed as in any manner affecting *the validity* of waivers made prior to the enactment of this Act, which *shall be determined according to the law in existence at the time such waiver was filed.* (Italics ours.)

It is submitted, therefore, that when determining the validity of the waivers in question, Section 506 of the 1928 Act must be given effect, for by that section Congress specifically provided a statutory rule to be followed by the courts in determining the effectiveness or validity of **all** waivers. That section expressly provides that the validity of all waivers **shall be determined according to the law in existence at the time they were filed.** The 1924 Act was in effect when the waivers were filed in the instant cases, hence we must look to that Act in order to determine their validity.

Admittedly the taxes were barred when assessed and collected, unless the waivers given on February 23, 1926, were effective to extend the time beyond the date of enact-

ment of the 1926 Act and likewise to include the date of assessment and collection. This brings us immediately to our consideration of the effect of the waivers.

At the time the Commissioner required petitioners to execute the waivers in these cases the 1924 Act was in effect; also, when they were executed the statutory period had expired, it having expired on April 1, 1923, fourteen months prior to the enactment of the 1924 Act, and two years, ~~thirteen~~ fourteen months prior to the execution of the waivers.

The Revenue Act of 1924, then in effect, provided in Section 277 that taxes due for 1917 (the year here involved) should be assessed and collected within five years after the return was filed except as provided in Section 278, *supra*.

The exception provided in Section 278, to the applicable five year period, was that the Commissioner and the taxpayer might consent in writing to extend that time; that they might execute a written waiver. However, it is submitted, such exception was limited by subdivision (c) of the same section to those cases **not already barred** at the time of the enactment of that Act.

This point is the crux of these cases and presents the ultimate question to be determined by this Court, pursuant to the order granting certiorari, *supra*.

Subdivision (c) of Section 278 of the Revenue Act of 1924—the Act in effect when these waivers were executed—constituted the sole authority, **statutory or otherwise**, for the extension of the applicable general statutory period; and, because of the limitation placed upon that subdivision by subdivision (c) of the same section, it did not authorize the extension of such statutory period, if such period had already expired prior to the passage of that Act.

In support of this position, we respectfully submit the following.

I.

Where Congress Enacts a Statutory Exception to the General Statutory Rule, that Exception is Exclusive.

The general rule—effective when the waivers were given—limiting the time within which the Commissioner might assess and collect further taxes in these cases, was provided in Section 277 of the 1924 Act; by that section Congress enacted the five year period of limitation. To the general rule thus provided, there was but one exception (pertinent here) provided by Congress, *i. e.*, Section 278. Unless these cases come within that one exception, the taxes were barred when assessed and collected.

Unless these waivers are such as were authorized by Section 278, and unless they and the cases in which they were given come within the terms of the exception for which such section provided, the exception to Section 277, provided in Section 278 **does not apply.** There is no exception to the general rule of five years, provided by Section 277, pertinent to our present consideration, **other than Section** 278; if the facts relied upon by respondent do not make out the case provided for by Section 278, it will not avail respondent to contend that such facts constitute a common law exception, for an express exception to a general statutory rule **excludes all other exceptions** (*Equitable Life Assurance Society v. Clements*, 140 U. S. 226, 233; *Bond v. Hoyt*, 13 Pet. 261).

An exception to the enacting clause must be strictly construed, so as to take out of such enacting clause **only** those cases which fall fairly and squarely within the terms of such exception, and the burden of proving the existence of such exception is on one claiming its benefit (*Thomas E. Basham Co. v. Lucas*, 21 Fed. (2d) 550). See also *United States v. Dickson*, 15 Pet. 141, where this Court, speaking through Mr. Justice Story, at page 165, held:

> "* * * we are led to the general rule of law which has always prevailed, and become consecrated almost as a maxim in the interpretation of statutes, that where the enacting clause is general in its language and objects, and a proviso is afterward introduced, that proviso is construed *strictly* and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves *special exceptions only* out of the enacting clause; and those who set up any such exception, must establish it as being *within the words* as well as within the reason thereof." (Italics ours.)

The enacting clause applicable here is Section 277 of the 1924 Act, which enacted the five year period of limitation, subject to the exceptions contained in Section 278 of the same Act. Unless the facts in these cases bring them squarely within the provisions of the exception (Section 278), then, under the applicable rules of statutory construction, above-stated, the exception is wholly inapplicable and respondent's defense must fall.

To this latter question we next address ourselves.

II.

Where the Tax Was Barred at the Time of the Enactment of the Revenue Act of 1924, Section 278 (c) Thereof Did Not Authorize Waivers.

The exception contained in Section 278 (c) of the 1924 Act, *i. e.*, where the Commissioner and the taxpayer consent in writing that the tax may be assessed after the five year period, is inapplicable here because subdivision (e), of the same section, limited the application of (c) to cases **without the scope of** (e); these cases are without the scope of subdivision (c) as the taxes were barred when the 1924 Act was passed.

We now consider the ultimate question presented by the cases, namely: whether, because of the limitation placed upon it by subdivision (e) of the same section, Section 278 (c) authorized the waivers.

The court below, in recording its dissent from the decision of the Circuit Court of Appeals for the 2nd Circuit, in the case of *Uncasville Mfg. Co. v. Commissioner*, 55 Fed. (2d) 893, which decision on this point held against the Government, stated: "In the *Uncasville Mfg. Company case* the court construed section 278 (c) of the revenue act of 1924 as a *prohibition* upon the giving of a waiver by a taxpayer and the acceptance thereof by the Commissioner. We are unable to find any provision in the 1924 revenue act which precludes a taxpayer from voluntarily waiving the benefits of the statute of limitation, nor do we find anything in such act prohibiting the commissioner's acceptance of such waiver." The court below was in error in so narrowly restricting its view of the matter. Manifestly, subdivision (c) of Section 278 standing alone does not constitute a prohibition of waivers, nor does any other single provision of the 1924 Act do so. It is only when we read Sections 277 and 278 (c) and (c) together, as we must do, that we find the prohibition to exist as relating to cases falling within the terms of subdivision (c) i. e., where the tax was barred when that Act was passed.

More strictly speaking, the existing prohibition is provided in Section 277, for there is provided the general rule of five years, subject to the exception provided in Section 278; if that exception, which provides for waivers in certain cases, is—as contended by petitioners—inapplicable, then the general rule of Section 277 must be enforced, and that rule is **an absolute and positive prohibition of assessment and collection after five years.** Thus, we find that the waivers in these cases **were prohibited.**

In urging upon this Court the adoption of the conclusion reached by the Circuit Court of Appeals in the *Uncasville case, supra*, we submit, in addition to the very cogent reasons relied upon by that court, the following.

In enacting Section 278 which provided a further period of time for both assessment and collection of taxes, in ad-

dition to the period provided in Section 277, Congress expressly provided, by enacting the qualifying subdivision (e), that such further period was **not to be extended** to cases within the purview of that subdivision, i. e., where **assessment or collection was barred** at the time of the enactment of the Act, or where the assessment or a proceeding to collect had been made or begun prior to its enactment.

Congress could not have employed more specific language to accomplish its purpose; the subdivision is clear, plain, and unambiguous, and will admit of no strained construction. It must be applied as we find it, and it has been applied by this Court in that very manner, in the case of *Russell et al. v. United States*, 278 U. S. 181.

In that case the Court had for its consideration the effect of Section 278 upon cases falling within clause (2) of subdivision (e); though we are now concerned with clause (1) of that subdivision, we submit that because of the unity of purpose of Congress in enacting it, so apparent from its context, the subdivision must be considered as a whole, and what the Court there said is equally applicable here.

The Court, speaking through Mr. Justice McReynolds, beginning at page 187, said:

> "But section 278 further provides that it shall *not authorize* the collection of a tax *after the same has become barred* by the applicable statute, * * *"
>
> "If an assessment made before that date comes within the ambit of section 278, its effect would be retroactive; and certainly it would produce radical change in the existing status of the claim against the petitioners—* * * United States v. Magnolia Petroleum Co., 276 U. S. 160, 48 S. Ct. 236, 72 L. Ed. 509, declares, 'Statutes are not to be given retroactive effect or construed to change the status of claims fixed in accordance with earlier provisions unless the legislative purpose so to do plainly appears.' No plain purpose to change the status of the claim against petitioners as it existed just before June 2, 1924, can *be spelled out of the words in section 278 or otherwhere.*"

> "* * * Some real force must be given to the words used—they were not employed without definite purpose. The rather obvious design, we think, was to deprive section 278 of any possible application to cases where assessment had been made prior to June 2, 1924." (Italics ours.)

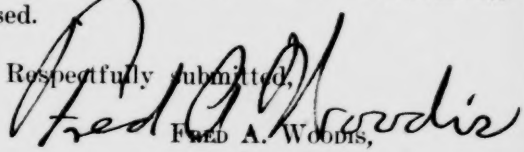
Sound reasoning impels us to the conclusion that Congress would have less reason to prohibit the application of Section 278 to cases wherein assessment had already been made, either timely or untimely, than to prohibit its application to cases where assessment and/or collection were barred at the time of its enactment; for those cases of the former instance would be those where the Commissioner had performed the preliminary acts necessary to collect the additional tax, wherefore, if the section was intended to have any retroactive effect such effect would certainly have been extended to that class of cases (where the Commissioner had so far prevented jeopardy to the rights of the Government by making the assessment within the statutory period). Yet, this Court held in the *Russell case, supra,* that, because of the qualification contained in the subdivision we are now considering, the section was deprived of any application to such cases.

Thus if the intention of Congress was that the section should not apply to those cases where the Commissioner had already proceeded to preserve and protect the interests of the Government, as above pointed out, how can it be said that its intention was that the section should apply, nevertheless, to those cases where the Commissioner had *not taken any of the steps* necessary to prevent jeopardy to the Government's interests, i. e., those cases in which he had slumbered, and, had permitted the bar of the statute to fall against the Government? We submit that *a fortiori* Congress did not intend the latter, and further submit that it plainly evidenced a contrary intention by enacting the provision in question.

CONCLUSION.

The judgments of the Court of Claims are erroneous and should be reversed.

Respectfully submitted,



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